SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 204

HERBERT S. BAUCH, as President of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and ELIZABETH BOND, CLARA LEVINE, SHIRLEY FEINBERG and ELIZABETH McGEE on behalf of themselves and all other employees of the City of New York who have executed authorizations for payroll deductions in favor of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, similarly situated,

Petitioners,

against

THE CITY OF NEW YORK, JOHN V. LINDSAY, Mayor of the City of New York, MARIO PROCACCINO, Comptroller of the City of New York, HENRY SHEMIN, Commissioner of Labor of the City of New York, and HERBERT HABER, Director of Labor Relations of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Herbert S. Bauch, as President of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Elizabeth Bond, Clara Levine, Shirley Feinberg and Elizabeth McGee, on behalf of themselves and all other employees of the City of New York who have executed authorizations for payroll deductions in favor of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, similarly situated, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on April 11, 1968.

Opinions Below

The opinion of the Court of Appeals of the State of New York, dated April 11, 1968 is reported at 22 N.Y. 2d 599, — N.Y.S. 2d —, and also at 67 LRRM 2994 and 57 CCH LC ¶ 51,877. It is set forth in full at Appendix A herein, 1a-6a. The opinion of the Supreme Court of the State of New York, County of New York, at Special Term, dated July 25, 1967, is reported at 54 Misc. 2d 343, 282 N.Y.S. 2d 816 and also at 66 LRRM 2226 and 56 CCH LC p. 65,836. It is set forth in full at pages 117-129 of the printed record before the Court of Appeals, submitted herewith pursuant to Rule 21.1 and at Appendix B herein, 7a-19a.

Jurisdiction

The judgment sought to be reviewed was dated and entered in the Court of Appeals of the State of New York on April 11, 1968, and was filed in the office of the Clerk of New York County on April 18, 1968, upon Petitioners' appeal from the order of the Appellate Division of the Supreme Court of the State of New York, First Department, dated and filed in the office of the Clerk of said Appellate Division on November 21, 1967, which said order of the Appellate Division affirmed the order and judgment of the Supreme Court of the State of New York, County of New York, at Special Term, dated August 11, 1967, and filed in the office of the Clerk of New York County on August 15, 1967, which said order and judgment of the Supreme Court dismissed the petition herein. The judgment of the Court of Appeals is set forth at Appendix C herein, 20a-22a. The order of the Appellate Division is set forth at page 133 of the printed record before the Court of Appeals and is reported at 28 A.D. 2d 1209, 285 N.Y.S. 2d 263. The order and judgment of the Supreme Court at Special Term is set set forth at pages 5-6 of the printed record before the Court of Appeals.

The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is invoked under 28 U.S.C. Section 1257(3).

Question Presented

Does the grant by a municipal government of exclusive dues check-off privileges to a union representing a majority of its employees in a collective bargaining unit, and to the members of such majority union, and the withdrawal of all check-off privileges from a minority union, and its members, violate the First and Fourteenth Amendments of the Constitution of the United States?

Constitutional Provisions Involved

The Constitutional provisions involved are the First Amendment of the Constitution of the United States and Section 1 of the Fourteenth Amendment of the Constitution of the United States. The First Amendment of the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case *

I

Presentation of the Constitutional Issue Below

Petitioners' claim under the Constitution of the United States was raised in the initial pleading before the Supreme Court of the State of New York, namely, the petition, verified December 14, 1966, and filed in the office of the Clerk of New York County on December 15, 1966 (12-13). The answer, verified April 18, 1967, denied the allegations of a Constitutional claim (36). The opinion of the Supreme Court at Special Term dealt with and denied the Constitutional claim (124-128, 14a-19a). The Constitutional claim was presented before the Appellate Division. The Appellate Division did not render an opinion (133). The appeal to the Court of Appeals was taken on Constitutional grounds (1a). The opinion of the Court of Appeals dealt with and denied the Constitutional claim (5a-6a).

II

The Question at Issue

The issue in this case was well stated by Chief Judge Fuld of the New York Court of Appeals as follows:

> "This appeal taken upon constitutional grounds, poses the question—of first impression in this court— whether the City of New York may grant a dues 'check-off' privilege to a union representing a majority of the municipal employees in a city-wide bargaining unit and yet deny such privilege to a minority union." (1a)

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* Numerical citations refer to pages of the printed record before the Court of Appeals submitted herewith, unless otherwise indicated. Numerical citations followed by the letter "a" refer to pages of the annexed appendices.

The New York Court of Appeals answered the question affirmatively. It is the Petitioners' contention that this was in error and that the act of the City of New York violated their rights under the First and Fourteenth Amendments of the Constitution of the United States.

III

Union Petitioner

Petitioner, Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "Union" or "Local 832"), is a civil service union whose membership consists of approximately 1,700 City employees (25). Most of Local 832's members are employed in non-supervisory clerical positions (26). These employees are traditionally among the lowest paid of all workers in the City. They include a disproportionately large number of persons from society's poorest economic groups (*Ibid.*).

IV

Individual Petitioners

Petitioners Elizabeth Bond, Clara Levine, Shirley Feinberg and Elizabeth McGee are employees of the City of New York who are members of the petitioner Union and who have executed authorizations for payroll deductions in favor of the petitioner Union. They sue "on behalf of themselves and all other employees of the City of New York who have executed authorizations for payroll deductions in favor of Local 832, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, similarly situated" (9, 10).

V

Check-Off

Since 1956 the City of New York (hereinafter the "City") has maintained in effect an arrangement whereby its employees are permitted to assign out of their wages an amount equal to their union dues which is then paid over to the designated union at regular intervals (11, 38). Such an arrangement is commonly referred to in labor relations terminology as the check-off.

The check-off is contingent upon receipt by the City of a written authorization by each employee whose wages are to be affected (16). When so authorized, the City customarily makes the appropriate deduction at the close of each payroll period and pays it over to the designated union through a committee established for that purpose (19-21).

The check-off was instituted by the City pursuant to a resolution adopted by the Board of Estimate on January 12, 1956 (11, 38). The Board of Estimate's action was based upon an opinion of the Corporation Counsel who ruled that the check-off could validly be undertaken by the City, upon condition however that if granted to one union it must be granted to all unions. The following is the relevant portion of the resolution, including the reference to the opinion of the Corporation Counsel:

> "Whereas, the Corporation Counsel has rendered an opinion to the effect that the City can legally accept and honor such [check-off] authorization under the following circumstances:
>
> • • •
>
> "(2) It should be founded upon an agreement by the union and each individual employee consenting to such deduction.
>
> • • •
>
> "(5) These authorizations should be available to all unions, without discrimination • • •" (15).

From 1956 until 1966 the City, pursuant to the Corporation Counsel's ruling, maintained the check-off for all employees who wished to avail themselves of this convenience. The arrangement was non-discriminatory. It was a matter of indifference to the City which union the employee selected and whether that union was a majority or a minority union (29-30).

In effect this arrangement made available to all employees the City's Treasury and payroll facilities upon an impartial basis.

VI

Need of Low-Income Workers for Check-off

The check-off is of tremendous value to low income City workers and their unions. City jobs are scattered widely throughout the City's more than 300 square miles. The same is true of workers' homes, some of which are in Long Island or other suburbs. The Union's 1,700 members are employed in dozens of the City's departments and agencies (25). They are scattered throughout 400 locations in the five boroughs (28).

It is not a simple matter for a City worker to travel to the union office after each two-week pay-day to make payment of his dues. Such a round trip may involve two hours or more of travel. A low-income worker can afford neither the time nor the subway fare. The hours of his work may be such that he cannot get to the union office at all unless he leaves his job.

Low-income workers of the categories here involved do not customarily have regular checking accounts (26). They cannot therefore mail a check to the union in payment of their dues after each pay-day, and they would certainly be ill-advised to attempt to send cash by mail. The purchase of postal money orders involves not only additional expense but travel to a post office and waiting time for the issuance

of the money order. The worker would again face the dilemma of taking time off from his job or failing to pay his dues on time.

The dispersion of these workers throughout the City as well as the obvious unreliability and disruptive effect of trying to bring in the dues by union collectors calling at job sites make that method unworkable (96-97). It is impossible for a labor organization to maintain a professional staff capable of collecting dues in 400 locations throughout a wide geographical area. Even if that could be done, the cost of collecting dues would exceed the amounts collected (31). If low-income workers do not pay their dues promptly they spend their money and find it impossible to catch up at a later date (31). Prompt payment by check-off has been found to be the only practical method for assuring essential revenues to labor unions and for protection of the good standing and the benefits of union members (28, 30).

While these considerations are particularly applicable to low-income municipal employees, similar considerations obtain throughout private industry. Because of these considerations check-off is the prevailing method for the collection of union dues (27-28, 96, 97). For industry generally the check-off was validated by Section 302(c)(4) of the Lobor-Management Relations Act of 1947, 29 U.S.C. § 186 (c)(4), which excepts from proscribed payments to unions:

> ". . . money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment . . ."

For the railway and airline industries such deductions are authorized by Section 2 Eleventh (b) of the Railway Labor Act, 45 U.S.C. § 2 Eleventh (b), which was added to the Act in 1951.

VII

Need of Union for Check-off

It is the uncontradicted allegation herein of Herbert S. Bauch, the President of Local 832, that it would be impossible for Local 832 to survive without the check-off, that it could not otherwise obtain its essential revenue, and that elimination of check-off would put Local 832 out of business (28, 30, 97).

VIII

The City's Deal with District Council 37 for Exclusive Check-off

During the latter part of 1966 the City engaged in negotiations with District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "D.C. 37") which it recognized as the majority union in a City-wide unit of non-supervisory clerical employees (30, 39-40). On December 2, 1966 the City agreed that D.C. 37 would thereafter have the check-off exclusively, and that check-off would be discontinued for all other unions representing such employees (*Ibid.*) The City thus agreed with a rival union that Local 832 should be deprived of its check-off privilege.

Apparently this deal was made because the City believed that if it strengthened the hand of D.C. 37, it could obtain better terms and conditions from that organization and forestall a strike. In this connection it submitted to the New York Supreme Court, at Special Term, a chart showing that D.C. 37 strikes have been responsible for more than 165,000 of the 220,140 man days lost in City employee work stoppages since 1958 (80-81). It decided therefore to give this special support to D.C. 37 and at the same time to weaken and destroy rival labor organizations which might compete for the loyalty of the employees.

The foregoing may be derived from the City's own papers. The affidavit of Herbert Haber, the City's Director of Labor Relations, states:

> "Such controversies, unless forestalled by sound and enlightened planning, can seriously interrupt the ability of the City government to provide essential services . . ." (67)
>
> "The exclusive check-off procedure is based on a recognition of the foregoing considerations. It grants the majority organization a form of support and prestige which enables it to withstand with less harm to its representative functioning, the effects of wasteful rivalries and disruptive minority campaigns" (71-72).
>
> "Experience in the private and public sectors has demonstrated that where the exclusive majority representative is given a defined role in the employee relations program, designed to secure the uninterrupted and efficient functioning of the employer's enterprises, it is necessary to provide arrangements which aid and strengthen its ability to carry out that role" (72).

IX

The Mayor's Executive Order

At the time the deal between the City and D.C. 37 was made there was no enabling legislation which would permit the City to withdraw check-off privileges from other unions. As part of his deal with D.C. 37 Haber promised to have the Mayor issue an Executive Order which would purport to legalize the grant to that union of exclusive check-off privileges (64). The proposed Executive Order would grant the check-off privilege exclusively to a union representing the majority of employees in an appropriate collective bargaining unit and would withdraw the check-off privilege from all minority unions. That Executive

Order has never been issued. The City alleges that it would have been issued but for the commencement of this proceeding on December 15, 1966, and the stipulation for a stay pending its hearing and determination (64-65) by the New York State courts.

X

Destructive Effect of City's Act

Herbert Bauch, President of the petitioner Union, described as follows some of the benefits other than mere membership, which the Union provides by means of the dues check-off:

> "6. Local 832 provides numerous benefits for its members without discrimination, whether or not they are included in certified bargaining units. These benefits include payments to a member's beneficiary upon his death, free dental care, ambulance service, blood transfusions, eye examinations and eyeglasses, rental of hospital beds, crutches and wheelchairs, and a very modest pension program.
>
> "7. These benefits are not luxuries. For the low-income people who are our members they are absolute necessities and constitute the only means by which these persons and their families are saved from public charity in time of need.
>
> "8. Members do not pay any premiums for these benefits. Eligibility is dependent solely upon prompt payment of dues which Local 832 must have to finance the benefits.
>
> "9. For several years prior to 1956 Local 832 and other labor organizations representing City employees were faced with severe financial hardships. On the one hand we were confronted with escalation of hospital and medical costs, rising insurance premiums and the need for improved administrative procedures to maintain contact with members as they became absorbed in the City's expanding bur-

> eaucracy. On the other hand the collection of dues was frequently impossible because most of our members were in a precarious economic condition." (27)

The destructive effect of the City's discriminatory action is described by Bauch as follows:

> "20. The agreement with AFSCME [D.C. 37] will cut off Local 832's revenues. It is impossible for any labor organization to achieve personal collection of dues from 1700 persons employed in 400 different locations throughout a large geographical area. The cost of collecting dues would exceed the amounts collected. Even if such an immense undertaking could be conceived, it would not be successful. The check-off system provides for deductions from each weekly or bi-weekly payroll. Such immediate deductions are essential because persons in the economic class of Local 832's members will not set aside monies from their payrolls. The agreement with AFSCME [D.C. 37] gives AFSCME [D.C. 37] nothing which it does not already have. It is a flagrantly discriminatory act which can have no purpose other than the destruction of Local 832 and the rights of its members." (31)

The above quoted statements are the uncontradicted facts of this record.

XI

The City's Contention

The City has attempted to rationalize and justify its action as a necessary strengthening of majority unions in the interest of greater stability in labor relations and less disruption of City services. It has compared its action to the granting of other forms of union security, such as the union shop provision and the provision for exclusive recognition of majority unions for collective bargaining purposes, and has asserted that in view of this Court's approval of the constitutionality of statutes authorizing such provisions the present case may be deemed *a fortiori*.

XII

The Decision of the New York Court of Appeals

The New York Court of Appeals found that under New York State law the Mayor of the City of New York was authorized to act as he did and that "no further legislative sanction is required". (3a) It also decided against Petitioners as to other contentions made under state law. Turning to constitutionality the court said:

> "Since we find no statutory obstacle in the way of the City's proposed check-off policy, we turn to a consideration of whether that policy would, as Local 832 urges, deprive it of due process or equal protection of the laws. We agree with the courts below that it would not. The requirements of due process are satisfied as long as the challenged measure is reasonably related to the attainment of a permissible objective. * * * Similarly, the standards of equal protection are met if a classification, or a distinction among classes, has some reasonable basis. * * *
>
> "In the case before us, the existence of such a reasonable relationship and basis is apparent. The maintenance of stability in the relations between the City and employee organizations as well as the avoidance of devastating work stoppages, are major responsibilities of the city administration. The Mayor seeks to further these objectives by introducing into city labor relations a practice which has become commonplace in private industry and in the labor policies of other governmental bodies. * * * The City program is in accord with national labor policy, which has been built on the premise that a majority organization is the most effective vehicle for improving wages, hours and working conditions. * * *
>
> "The petitioners also argue that the withdrawal of the dues check-off will weaken their minority union to the point of threatening its very existence. They will thus be deprived, they assert—pointing to such decisions as *Bates* v. *Little Rock* (361 U.S. 516), *N.A.A.C.P.* v. *Alabama* (357 U.S. 449) and *Thomas* v. *Collins* (323 U.S. 516) [footnote omitted]

—of their right of freedom of association guaranteed by the First and Fourteenth Amendments of the Federal Constitution and by Article I of the State Constitution. Their claim lacks substance. Nothing in the City's labor policy denies members of the petitioners' union the right to meet, to speak, to publish, to proselytize and to collect dues by the means employed by thousands of organizations of all kinds, that do not have the benefit of a dues check-off. Neither the First Amendment nor any other constitutional provision entitles them to the special aid of the City's collection and disbursing facilities." (5a-6a)

Reasons for Granting the Writ and Summary of Argument

This case involves two important Constitutional issues relating to the right of municipal employees to be free from discrimination based on union membership. These are:

1. Whether the discriminatory denial of union dues check-off privileges to a minority union and its members by a municipality denies such union and members of their Constitutionally protected freedom of association without due process; and

2. Whether the grant of exclusive union dues check-off privileges to a majority union and its members by a municipality violates the Constitutional guarantee of equal protection of the laws.

The Court of Appeals answered these questions in the negative. These questions have not been directly determined by this Court, but as is shown in the argument which follows, the rulings of the Court of Appeals are not in accord with the principles established in the relevant decisions of this Court.

Petitioners' contentions are set forth in the argument under the following headings:

POINT I

THE CITY'S ACT IS WHOLLY DESTRUCTIVE AND IS AN UNJUSTIFIABLE INVASION OF THE PETITIONERS' RIGHTS OF FREEDOM OF ASSOCIATION AND SPEECH.

Under Point I it is shown that the case at bar is unique in that the City of New York has taken away a vital privilege from the minority without granting anything which is essential to the welfare of the majority. It is an uncontradicted fact that withdrawal of check-off will destroy the Petitioner union. The City's act is therefore found to be a wholly destructive and unnecessary deprivation of minority rights, not justifiable on the basis of any compelling state interest.

POINT II

EVEN IF EXCLUSIVE CHECK-OFF WERE PERMISSIBLE IN THE PRIVATE SECTOR IT WOULD NOT BE PERMISSIBLE IN THE PUBLIC SECTOR.

Under Point II it is shown that since the denial of check-off in the case at bar involves a municipal government's positive act, and not merely permissive legislation applicable to employers and the unions with whom they deal on the basis of voluntary collective bargaining in the private sector, there is present the element of coerciveness which establishes the unconstitutional discrimination.

POINT III

THE CITY'S ACT VIOLATED THE PETITIONERS' RIGHTS UNDER THE EQUAL PROTECTION CLAUSE.

Under Point III it is shown that the check-off privilege in the case at bar involves a public facility, namely, the treasury and bookkeeping machinery of the City of New

York and that, as in the case of other public facilities which need not be made available to the public, once such facility is made available its use must be granted to all on a non-discriminatory basis. By unnecessarily limiting its use to majority unions the City made an unreasoned distinction and violated the Petitioners' rights under the Equal Protection Clause. There is no factual support in the record for the City's assertion that its act will stabilize labor relations except in the savage sense of exterminating minorities.

POINT I

The City's act is wholly destructive and is an unjustifiable invasion of the Petitioners' rights of freedom of association and speech.

The case at bar is unique in that the City of New York has taken away a vital privilege from the minority without granting anything which is essential to the welfare of the majority. Therefore it cannot be said that the decisions of this Court in cases such as *Railway Employees* v. *Hanson,* 351 U.S. 225 (1956) and *Virginian Railway* v. *System Federation,* 300 U.S. 515 (1937) are controlling here.

There is no inconsistency here, as there would be in the case of the exclusive bargaining privilege, in granting equal privileges to members of majority and minority unions. Once the majority union is granted a non-exclusive check-off privilege it has all that it needs. It gains nothing else of legitimate concern to it by making the privilege exclusive. Exclusivity in bargaining for the entire group is essential in order that the bargaining process may be viable. Exclusivity in check-off means only that the minority will be exterminated.

Of course it might be argued that there is some sort of gain for a majority when a competitive minority is exterminated, but that is precisely the sort of gain, autocratic

and vengeful rather than essential to the democratic process, which the Constitution must guard against. Whether or not the City of New York is right in its belief that it may gain more labor stability by exterminating minority labor organizations it is not entitled to achieve stability at that high cost.*

To deny to a minority union the facilities necessary for its economic life is also to deny the persons who have selected that union their constitutional right of freedom of association. The uncontradicted facts of this case are that check-off is an absolutely necessary requirement for the Union's survival and that the Union will be exterminated if its members are deprived of the check-off privilege (28, 30-31, 97). Freedom of association would be meaningless if the City could by such indirect means extinguish the group which the individual selected for his association.

In approving the exclusive bargaining privileges of majority unions, and in approving the union shop, this Court recognized that no effective system of industrial democracy could be established unless the minority yielded some privileges to make it possible for a functioning majority to exist. Some exclusive privileges for the majority were found to be indispensable if there were to be any bargaining process at all. Implicit in the Court's reasoning was the conclusion that we know of no means by which a free society may be maintained except by rule of the major-

* There is no factual support in the record for the City's claim that its act will stabilize labor relations. Non-discriminatory check-off privileges mean nothing more than that the City's facilities may be utilized impartially by all City employees. Such use does not determine union allegiance; it follows it. It does not create labor unrest or disruption but the very opposite. Employees sign check-off authorizations because they have selected a union. They do not select a union after or because of their check-off authorization. The fact is that suppression of free choice and denial of equal use of the City's check-off facilities is likely to cause disruption in labor relations, and not the reverse.

ity. It is the point of this petition that the foregoing concessions to democratic procedure are in the nature of necessary evils. But it is of the essence of this point that only such concessions as are indispensable are constitutionally permissible.

In the case of the exclusive collective bargaining privilege it is readily apparent that only one agent can perform the bargaining function for the group. A multiplicity of bargaining agents would, in effect, be industrial anarchy. It was necessary to conclude that the majority should function as the collective bargaining representative for the entire unit or else to conclude that labor organizations should have no bargaining sanction at all:

> "Wherever private contracts conflict with its [National Labor Relations Board's] functions, they obviously must yield or the Act would be reduced to a futility". (*J. I. Case* v. *N.L.R.B.* 321 U.S. 332 (1944))

As to the union shop provision, the facts of industrial life show that the costs of the bargaining process are great and that it cannot be expected to survive unless all employees who profit by it are required to contribute to its upkeep. Accordingly, it was concluded that the elimination of "free riders" was a legitimate necessity, and that the union shop and the agency shop could lawfully be granted to majority unions:

> "We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendment." (*Railway Employees'* v. *Hanson,* 351 U.S. 225, 236-238 (1956))
>
> ". . . all that was held in Hanson was that § 2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give

> 'financial support' to unions legally authorized to act as their collective bargaining agents." (*International Association of Machinists* v. *Street*, 367 U.S. 740, 749 (1961)).

In each case above considered a positive benefit was granted to the majority. In each case it appeared that such positive benefit was necessary for the survival of the majority. In no case was a privilege withdrawn from the minority without corresponding benefit to the majority.

The New York Court of Appeals' opinion states that "The City program is in accord with national labor policy, which has been built on the premise that a majority organization is the most effective vehicle for improving wages, hours and working conditions." (5a-6a). So far as it goes that may be a correct statement of national labor policy, but there should be added to it the observation that this Court has never sanctioned support of the majority which involved suppression of the minority on a matter not essential to the life of the majority. When this Court has had to consider the constitutional validity of majority union privileges it has carefully limited them to the actual necessities of industrial democracy. It has at the same time carefully pruned away excessive majority privileges which interfered with the constitutional rights of the minority.

In validating the union shop provision in Section 8(a)(3) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 158(a)(3), this Court has held that the obligation of the employee to become a "member of the majority union" can mean no more than that he must pay or tender the standard initiation fees and dues:

> "'Membership' as a condition of employment is whittled down to its financial core. This Court has said as much before in Radio Officers' Union v. Labor Board, 347 U. S. 17, 41, 74 S. Ct. 323, 336 . . ." (*N.L.R.B.* v. *General Motors Corporation*, 373 U.S. 734, 742 (1963))

Dues payments are deemed essential for the economic life of the majority union, but the necessity for sharing the cost of the bargaining process has been held not to include any obligation on the part of a dissenting employee to offer his loyalty to the majority. He is constitutionally entitled to reserve his loyalty for the organization of his choice or for no organization at all. Accordingly, he is not required to support the political activities of the union:

> "... we hold ... that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." (*International Association of Machinists* v. *Street*, 367 U.S. 740, 768-769 (1961)).

With respect to the exclusive bargaining privilege this Court was careful to point out, both with respect to the National Labor Relations Act (§ 9(a), 29 U.S.C. § 159(a), and with respect to the Railway Labor Act (§ 2 Ninth, 45 U.S.C. § 2 Ninth), that the statutes are worded so as to protect the individuals' rights to present grievances to their employer, and also to permit them to make individual contracts which do not interfere with "the negotiation of labor contracts generally applicable to employees". See *NLRB* v. *Jones and Laughlin*, 301 U.S. 1, 45 (1937) and *Virginian Railway* v. *System Federation*, 300 U.S. 515, 549 (1937). Before leaving these cases it should be noted that in *Virginian Railway* this Court did not pass on the constitutional rights of the employees, but stated that "The railroad can complain only of the infringement of its own constitutional immunity, not that of its employees". (300 U.S. 515, 558).

This Court has in no instance approved a wholly destructive and unnecessary deprivation of minority rights. That is the unique issue in the case at bar.

POINT II

Even if exclusive check-off were permissible in the private sector it would not be permissible in the public sector.

The discussion of the preceding point has shown that exclusive check-off is a wholly destructive provision which contributes nothing to the legitimate needs of the majority, and is not a justifiable limitation of the First Amendment rights of the minority even in the private sector of industry. When we come to consider the public sector the case is much clearer.

It has been shown that approval by this Court of the union shop provision in the private sector of industry does not involve any coercive governmental act. In *International Association of Machinists* v. *Street*, the dissenting opinion of Mr. Justice Frankfurter, joined in by Mr. Justice Harlan, pointed out:

> "Congress has not commanded that the railroads shall employ only those workers who are members of authorized unions. Congress has only given leave to a bargaining representative, democratically elected by a majority of workers, to enter into a particular contractual provision arrived at under the give-and-take of duly safeguarded bargaining procedures. (The statute forbids distortion of these procedures as, for instance, through racial discrimination. Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 65 S. Ct. 226, 98 L. Ed. 173.) Congress itself emphasized this vital distinction between authorization and compulsion. S. Rept. No. 2262, 81st Cong., 2d Sess. 2. And this Court in Hanson noted that 'The union shop provision of the Railway Labor Act is only permissive. Congress has not * * * required carriers and employees to enter into union shop agreements.' 351 U.S. at page 231, 76 S. Ct. at page 718. When we speak of the Government 'acting' in permitting the union shop, the scope and force of

> what Congress has done must be heeded. There is not a trace of compulsion involved—no exercise of restriction by Congress on the freedom of the carriers and the unions." (367 U.S. 740, 807)

In contrast, in the case at bar, by governmental act relating to the public facilities of a city, the members of minority unions are categorically deprived of the privilege of check-off. The City of New York has exercised state power specifically and coercively to assist members of certain unions in giving financial support to their organizations while denying to the members of other unions, no less taxpayers and citizens, equal access to a public facility.

When it is noted that employees in the public sector, in New York as well as elsewhere, are prohibited from striking or otherwise withdrawing their services from their municipal employer,* the totality of coerciveness is impressive. The minority employee cannot express his dissent in any effective way while the majority, in addition to exclusive bargaining rights, is given exclusive use of a public facility supported by the entire community.

The New York Court of Appeals, comparing the employees here involved to minority employees in the private sector, justified the denial of check-off as follows:

> "Nothing in the City's labor policy denies members of the petitioners' union the right to meet, to speak, to publish, to proselytize and to collect dues by the means employed by thousands of organizations of all kinds, that do not have the benefit of a dues check-off. Neither the First Amendment nor any other constitutional provision entitles them to the *special aid* of the City's collection and disbursing facilities." (6a) (emphasis added).

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* See the New York State Public Employees' Fair Employment Act, Civil Service Law, art. 14; L. 1967, ch. 392, known also as the Taylor Act.

What the Court of Appeals overlooked in making the above statement was that the City's disposition was not even-handed. Standing alone, denial of check-off privileges for all City employees would be constitutionally unassailable. The vice here is in the discrimination. Here we have not merely a denial of a privilege, but a grant to a favored majority coupled with a denial to a minority. Moreover, as we have shown, the denial appears to be uncalled for and unprincipled.

Finally, it can not be overlooked that for more than 10 years, since 1956, the City has granted check-off impartially to both majority and minority unions. The unions now representing City employees have been developed and matured in reliance upon the check-off. The City now proposes to remove a vital prop upon which the structure of its minority as well as its majority unions is based. This can not realistically be equated with a plea for "special aid" as expressed by the Court of Appeals. The Petitioners are not pleading for "special aid". They are pleading for non-discriminatory treatment in order to preserve their freedom of association.

The opinion of the Court of Appeals refers to exclusive check-off as "a practice which has become commonplace in private industry and in the labor policies of other governmental bodies". Among the examples cited is the reference to the Railway Labor Act (5a). This Court, however, has not passed on the constitutionality of an exclusive check-off statute even in relation to the private sector.

A check-off system in the railroad industry, limited to unions "national in scope" has been reviewed by the Eighth and Ninth Circuits but its constitutionality has not been questioned. In *Switchmen's Union* v. *Southern Pacific*, 253 F.2d 81 (9th Cir. 1958), the Court of Appeals for the Ninth Circuit construed the Railway Labor Act, 45 U.S.C.

§ 152, Eleventh (b)* and (c), as intended to prevent compulsory dual unionism in the railroad industry, noting the "high job mobility" in that industry, and therefore as intended to preclude check-off to certain labor organizations in order to avoid any compulsion for double payment of dues. There is no indication that any constitutional question was raised. This Court denied certiorari without opinion (358 U.S. 818 (1958), rehearing denied 358 U.S. 896 (1958)). In *Brotherhood of Locomotive Firemen* v. *Northern Pacific,* 274 F.2d 641 (8th Cir. 1960), another question as to the construction of § 152, Eleventh (b) and (c) of the Railway Labor Act was considered by the Eighth Circuit, and it was concluded that it was intended "to avoid compulsory dual unionism", but again there is no indication that any constitutional question was raised or considered. Both of these cases are based upon *Pennsylvania Railroad* v. *Rychlik,* 352 U.S. 480 (1957), in which this Court was construing Section 2, Eleventh (c) of the Railway Labor Act with respect to its union shop requirement only. This Court has had no occasion to consider the constitutionality of exclusive check-off.

As has already been pointed out, statutes such as the Railway Labor Act involve only permissiveness on the part of the government with respect to the scope of free collective bargaining in the private sector. They do not

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* Section 152, Eleventh provides that

> ". . . any carrier or carriers as defined in this Act and a labor organization or organizations duly designated and authorized to represent employees in accordance with the requirements of this Act *shall be permitted*—
>
> * * *
>
> (b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues . . ." (emphasis added).

involve the element of coerciveness which is present when the use of a state-owned facility is withdrawn from a minority. Whatever conclusion may ultimately be reached as to the private sector it is clear that in the public sector the state action complained of is unconstitutional.

POINT III

The City's act violated the Petitioners' rights under the Equal Protection Clause.

Discrimination by a State in permitting the use of its public facilities is prohibited by the Equal Protection Clause of the Fourteenth Amendment. *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966); *Brown* v. *Louisiana,* 383 U.S. 131 (1966); *East Meadow* v. *Board of Education,* 18 N.Y. 2d 129, 272 N.Y.S. 2d 341 (1966).

As this Court said in *Rinaldi, supra,* the State may not be required to provide certain facilities to the public, but, if provided, access must be granted to all persons equally:

> "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." (384 U.S. 305, 310)

In *Brown* v. *Louisiana, supra,* this Court stated in regard to the use of a public library:

> "A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all." (383 U.S. 131, 143)

In *East Meadow, supra,* the New York Court of Appeals, speaking of the use of a high school auditorium for public concerts, said:

> "The State is not under a duty to make school buildings available for public gatherings but, if it elects to do so, it is required, by constitutional provision (U.S. Const., 14th Amdt.; N.Y. Const., art. I, § 11), to grant the use of such facilities 'in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all.' (Brown v. State of Louisiana, 383 U.S. 131, 143, 86 S. Ct. 719, 724, 15 L. Ed. 2d 637; see, also, Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373; Matter of Ellis v. Allen, 4 A.D. 2d 343, 344, 165 N.Y.S. 2d 624, 626, app. dismd. 4 N.Y. 2d 693, 171 N.Y.S. 2d 86, mot. for lv. to app, den: 4 N.Y. 2d 674, 171 N.Y.S. 2d 1027, 148 N.E. 2d 915; American Civil Liberties Union v. Board of Educ., 59 Cal. 2d 224, 28 Cal. Rptr. 712, 379 P. 2d 16; Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P. 2d 885.) The defendant has concededly allowed a number of organizations, including the very plaintiff before us, to use the school auditorium for nonacademic purposes for many years. It follows, therefore, that, in deciding who is to be permitted to use its school, the board must not unconstitutionally discriminate against the plaintiff." (18 N.Y. 2d 129, 133-134, 272 N.Y.S 2d 341, 344-345)

The New York Court of Appeals has mistakenly attempted to distinguish this case upon the theory that it did not involve positive state action. Referring to *Bates* v. *Little Rock,* 361 U.S. 516 (1960), *NAACP* v. *Alabama,* 357 U.S. 449 (1958), and *Thomas* v. *Collins,* 323 U.S. 516 (1945), the New York Court of Appeals stated:

> "The petitioners' reliance on these decisions is misplaced. The cited cases involved attempts by states to hinder organizations by some affirmative prohibition upon, or intrusion into, their activities. There is not the slightest suggestion that a state or

> other body must provide services to an organization to help it maintain its competitive position with its rivals." (6a, n5)

The New York Court of Appeals somehow overlooked the fact that precisely what the City of New York did in this case was "to hinder organizations by some affirmative prohibtion". The City did not merely fail to provide a service, namely the check-off facility. It affirmatively joined with a rival union and agreed to enact a city law which would favor the rival union, as well as other majority unions, and which would result in the extermination of the petitioner Union. It made exclusive check-off compulsory. That is not a mere failure to assist. It is a positive and discriminatory deprivation.

The New York Court of Appeals has described the exclusive check-off arrangement as "a method of implementing union security, so widely utilized and so long tested", and has therefore declared it to be a provision which "may not be said to lack a reasonable basis or to be unrelated to the City's legitimate purposes" (6a).

There is, however, no factual basis in the record for such a conclusion. The City has made no attempt to show what legitimate benefit it or the majority union gains by visiting this deprivation upon the minority. The functioning of the majority is in no way improved or facilitated. What it plainly boils down to is the extermination of the minority. This is not an implementation of "union security" except in the most savage sense. It is an "unreasoned distinction" such as this Court struck down in *Rinaldi* v. *Yeager,* and in *Brown* v. *Louisiana.*

The Court of Appeals uncritically accepted the City's claim that its act was founded on a "reasonable basis":

> "The maintenance of stability in the relations between the City and employee organizations as well as the avoidance of devasting work stoppages, are

> major responsibilities of the city administration. The Mayor seeks to further these objectives by introducing into city labor relations a practice which has become commonplace in private industry and in the labor policies of other governmental bodies . . ." (5a)

As we have pointed out earlier (p. 17n, *supra*), there is no factual basis for the assertion that labor relations will be stabilized and strikes avoided by exclusivity of check-off. Employees sign check-off authorizations after they select a union; they do not select a union after they have signed the check-off. Suppression of free choice and denial of equal use of the City's check-off facilities appears more likely to cause disruption in labor relations than the reverse. No study has been shown, no legislative hearing has been pointed to, no experience has been set forth which purports to demonstrate that a discrimination such as is here involved (a) is necessary for the survival of the majority or (b) would contribute to peaceful labor conditions. The City's assertion to the contrary is not self-validating; it is simply the least that might be expected of the City in defense of its action.

Where personal liberty is involved, such as freedom of association, this Court has not accepted assertions of reason and necessity uncritically. It has placed the burden on the State of demonstrating the validity of its assertions:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. N.A.A.C.P. v. State of Alabama, 357 U.S. 449, 78 S. Ct. 1163 . . ." (*Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960))

This record is devoid of proof showing that a reasonable distinction based upon a compelling State interest was the basis for the City's action.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York.

Respectfully submitted,

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